Office-Supreme Court, U.S.
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No. 82-1968

In the Supreme Court of the United States

OCTOBER TERM, 1983

ARKLA, INC., PETITIONER

v.

FRANK J. HALL, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in directing the Federal Energy Regulatory Commission to grant the application of the natural gas producer respondents for a waiver of the notice and filing requirements of Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d).

2. Whether the waiver provision of Section 4(d) is available for retroactive collection of a higher rate than that on file with the Commission.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 ..... 2, 3, 7, 8, 9

City of Cleveland v. *FPC*, 525 F.2d 845 9

City of Piqua v. *FERC*, 610 F.2d 950 ..... 4, 9, 10

Continental Oil Co. v. *FPC*, 236 F.2d 839 9

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 5

FPC v. *Idaho Power Co.*, 344 U.S. 17 6

NLRB v. *Food Store Employees Union, Local 347*, 417 U.S. 1 6

Presbyterian Hospital v. *Harris*, 638 F.2d 1381 7

Shell Oil Co. v. *FERC*, 707 F.2d 230 7

Shell Oil Co. v. *FPC*, 334 F.2d 1002 9

Page

Cases—Continued:

South Prairie Construction Co. v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800 6

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 9

Statute:

Natural Gas Act, 15 U.S.C. (& Supp. V) 717 *et seq.* :

Section 4(d), 15 U.S.C. 717c(d) 2, 5, 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 691 F.2d 1184. The opinion of Chief Judge Clark, dissenting from the denial of rehearing (Pet. App. 30a-33a), is reported at 700 F.2d 218. The order of the Federal Energy Regulatory Commission (Pet. App. 37a-49a) is reported at 13 F.E.R.C. para. 61,100.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1982. A petition for rehearing was denied on March 14, 1983 (Pet. App. 30a). The petition for a writ of certiorari was filed on June 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 717r(b).

STATUTE INVOLVED

Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d), provides:

> Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

STATEMENT

1. This case is a sequel to *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) ("*Arkla* v. *Hall*"). As the Court will recall (see *id.* at 573-576), in 1952, the private respondents, who are producers of natural gas, entered into a contract to sell gas to petitioner Arkla from the Sligo Gas Field in Louisiana. The contract contained a fixed price schedule and a "favored nations clause," which provided for a price increase if Arkla purchased Sligo Field gas from another party at a higher rate than the one it was paying respondents. In 1954, respondents filed the contract and rates with the Federal Power Commission (now the Federal Energy Regulatory Commission), and obtained from the Commission a certificate authorizing the sale of gas at the rates specified in the contract.

In 1961, Arkla purchased certain leases in the Sligo Field from the United States and began producing gas on its leasehold. In 1974, respondents sued Arkla for breach of contract in Louisiana state court, claiming that Arkla's lease payments to the United States had triggered the favored nations clause. Because Arkla had not increased its payments to respondents as required by the clause, respondents sought as damages an amount equal to the difference between the price they actually were paid in the intervening years and the price they would have been paid had the favored nations clause gone into effect.

In *Arkla* v. *Hall*, this Court held that the "filed rate doctrine" prohibited the Louisiana court from awarding damages to respondents for breach of contract based on the assumption that, had a higher rate been filed, the Commission would have approved it. In so holding, the Court observed that the Natural Gas Act "bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold." 453 U.S. at 578. The Court concluded that "[i]t would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act." *Id.* at 579. The Court noted, however, that, "[a]lthough the Commission may not *impose* a retroactive rate alteration and, in particular, may not order reparations, * * * it may 'for good cause shown,' 15 U.S.C. § 717c(d), waive the usual requirement of timely filing of an alteration in a rate." 453 U.S. at 578 n.8 (emphasis in original). In this regard, the Court assumed, *arguendo*, that "waiver is available for retroactive collection of a higher rate than the one on file." *Ibid.*

2. While the parties were litigating the state damages action, respondents applied to the Commission for a waiver of the statutory filing requirements. The Commission denied respondents' application. Pet. App. 37a-49a. The Commission acknowledged that, as between respondents and Arkla, "the equities are favorable to [respondents]" (*id.* at 48a), but decided to deny the waiver after considering the matter in the context of its broader regulatory responsibilities. *Id.* at 49a. In particular, the Commission expressed its concern over the potential liability of current consumers for higher rates that should have been paid between 1961 and 1972, and over the potential disruption in the industry were the Commission to grant similar waiver requests by other producers within the Sligo Field area. *Id.* at 46a-47a. In addition, the Commission expressed uncertainty about whether it would have permitted the higher rates to go into effect in 1961. *Id.* at 47a-48a.

A divided court of appeals reversed. Pet. App. 1a-29a. The court rejected the reasons cited by the Commission in its order and held that the Commission abused its discretion in denying respondents' application for a waiver. *Id.* at 12a-22a. The court first ruled that the grant of a waiver in this case, to effectuate the contractual arrangement between the parties as construed by the state court, was not inconsistent with the statutory policy against retroactive ratemaking. *Id.* at 12a-15a, citing *City of Piqua* v. *FERC*, 610 F.2d 950 (D.C. Cir. 1979). The court then determined that the potential liability of current consumers for any rate increase is speculative in nature and that the Commission, in any event, could consider the question when petitioner applied for a rate increase. Pet. App. 15a-18a. Furthermore, the court concluded that the state court's construction of the particular favored nations clause at issue here would not be binding on the Commission in other cases and, accordingly, the Commission would be free to rule in future cases

that royalty payments do not trigger favored nations clauses. *Id.* at 18a-20a. In addition, the court held that, because the Commission in this case had acceded to the state court's determination that Arkla's royalty payments to the United States activated the favored nations clause, the Commission could not speculate that it would have rejected a timely filing by respondents for higher rates in 1961 based on a different interpretation of that clause. *Id.* at 21a-22a. The court remanded the case to permit the Commission to grant the waiver and determine the just and reasonable rate to which respondents are entitled. *Id.* at 22a-26a.

In dissent, Chief Judge Clark expressed the view that if respondents' waiver application were granted and they were permitted to collect higher rates from Arkla for the period in question, current ratepayers would have to bear the burden of the increase in costs. Chief Judge Clark concluded that, in these circumstances, the Commission properly denied the waiver application on the ground that it would be inequitable for current consumers to bear this burden. Pet. App. 29a.

ARGUMENT

1. For the reasons expressed by Chief Judge Clark in his dissenting opinion below (Pet. App. 29a), we believe that the court of appeals erred in reversing the Commission's order denying respondents' application, pursuant to 15 U.S.C. 717c(d), for a waiver of the filing requirements of the Natural Gas Act. Moreover, we fully agree with petitioner (Pet. 14-15) that, even if the court of appeals were correct in setting aside the Commission's order, the court should not have required the Commission on remand to grant respondents' request for a waiver. As this Court long ago recognized, once a reviewing court lays bare an agency's error and "compel[s] obedience to its correction," it has "exhausted the only power which Congress gave it." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). See

South Prairie Construction Co. v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805-806 (1976); *NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). Thus, at a minimum, the court of appeals should have permitted the Commission to bolster the record or to consider whether other reasons might militate against granting a waiver to respondents. By foreclosing the Commission from considering these alternatives on remand, the court below improperly arrogated to itself the "power to exercise an essentially administrative function." *Id.* at 21.

Despite the clear error of the court of appeals, we believe, for the following reasons, that this issue does not warrant plenary review by this Court.

(a) First, the court of appeals specifically limited the reach of its holding to the particular contract entered into by the private parties to this case. The court noted that this case is in a "unique" posture and that the decision here "simply [has] no res judicata or collateral estoppel effect in a different administrative proceeding between different parties." Pet. App. 19a. Thus, if a similar situation regarding a favored nations clause and a royalty payment were to arise again, the Commission could, if need be, prevent any harm to the public interest by ruling at the outset that the favored nations clause was not activated by the royalty payment, without having to decide whether to grant a waiver. Of course, in any case presenting circumstances different from those involved here, the Commission would be free, under the court of appeals' decision, to determine whether those different circumstances warranted denial of a waiver.

(b) Moreover, the impact of the court of appeals' decision is far from clear even with respect to this case. Although the court ordered the Commission to grant the waiver, the court left it to the Commission to calculate the precise amount of the increase to which respondents are

entitled. Pet. App. 22a-26a. As the Commission noted in a previous filing in this Court — one that addressed another aspect of this case (see Pet. App. 24a) — the Commission is "unable to determine conclusively" the maximum level to which respondents' rates may rise. Thus, it may well be that the impact of the rate increase here would be minimal.

(c) Finally, although it appears that the court of appeals' directive to the Commission to grant respondents' waiver application was not simply an oversight,[1] we doubt that the decision below portends future attempts by the court to usurp the authority of administrative agencies in similar circumstances. In fact, both prior and subsequent to its decision here, the court of appeals has kept within proper bounds in reviewing agency determinations. See, *e.g.*, *Presbyterian Hospital* v. *Harris*, 638 F.2d 1381, 1389 (5th Cir. 1981); *Shell Oil Co.* v. *FERC*, 707 F.2d 230, 236 n.9 (5th Cir. 1983). At the present time, therefore, there is no reason to believe that the court is likely to repeat its error in future cases.

2. The remaining questions presented in the petition also do not warrant this Court's review, and may be disposed of in short order.

(a) Contrary to petitioner's contention (Pet. 18-24), the court of appeals correctly concluded (Pet. App. 8a-10a) that this Court's decision in *Arkla* v. *Hall* did not, either expressly or by implication, preclude respondents from seeking a waiver of the statutory filing requirements, or preclude the court of appeals from reviewing the Commission's order denying the waiver. This Court held only that a state court may not "award as damages a rate never filed

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[1]In its petition for rehearing en banc (at 11-12), the Commission pointed out that the court of appeals exceeded its authority by determining in effect that "good cause" exists for the waiver. The court nevertheless denied the petition (Pet. App. 30a).

with the Commission and thus never found to be reasonable within the meaning of the Act." 453 U.S. at 579. At the same time, the Court acknowledged the possibility that a regulated seller of natural gas may obtain a waiver. *Id.* at 577. Indeed, the Court assumed, *arguendo*, that "waiver is available for retroactive collection of a higher rate than the one on file" (*id.* at 578 n.8), and it noted that the Commission's order denying respondents' waiver application was then pending before the court of appeals. *Id.* at 576 n.6.

Moreover, the result reached by the court of appeals in this case does not conflict with this Court's decision in *Arkla* v. *Hall*. It is true that in *Arkla*, this Court rejected respondents' appeal to "equitable considerations" on the ground that such considerations cannot justify a state court's usurpation of federal authority by awarding "what amounts to a retroactive right to collect a rate in excess of the filed rate." 453 U.S. at 584. There would be no usurpation of federal authority, however, if the Commission were to determine that respondents demonstrated good cause for a waiver of the statutory filing requirements. In addition, although the Court in *Arkla* made frequent reference to statements in the Commission's order denying the waiver (*e.g.*, 453 U.S. at 576 n.6, 579 & n.10, 583 n.13), the Court did not specifically endorse these statements or rely on them for its holding.[2]

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[2]For example, in rejecting respondents' argument that no federal interests were affected by the state court's imposition of damages, the Court quoted the Commission's statements that a waiver might have " 'an unsettling effect . . . on other gas purchase transactions' and would have a 'potential for disruption of natural gas markets . . . .' " 453 U.S. at 579. Immediately thereafter, however, the Court stated that it would reject respondents' argument "[e]ven were the Commission not on record in this case," because the state court's award of damages was in conflict with the exclusive form of regulation established by Congress in the Natural Gas Act. *Id.* at 580.

(b) Petitioner's challenge to the Commission's waiver authority (Pet. 24-26) similarly does not withstand analysis. Petitioner cites nothing in the legislative history of the Natural Gas Act to counter the express language of the statute that the Commission, "for good cause shown, may allow [rate] changes to take effect without requiring * * * thirty days notice * * *." 15 U.S.C. 717c(d). Moreover, in none of the cases petitioner cites (Pet. 24-25) did the courts confront a situation in which the Commission granted a waiver and a party challenged the Commission's authority to do so.[3] Any statements in those cases, suggesting that where a waiver is granted rate changes must be prospective only, therefore may be regarded as dicta.

The court of appeals correctly pointed out (Pet. App. 13a-14a) that, in *City of Piqua* v. *FERC*, *supra*, the D.C. Circuit directly confronted the issue and upheld the Commission's authority to grant retroactive waivers. In *City of Piqua*, the court observed that the considerations underlying the filed rate doctrine are " 'preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.' " 610 F.2d at 955, quoting *City of Cleveland* v. *FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976). See *Arkla* v. *Hall*, 453 U.S. at 577-578. The court concluded that these policies are not undermined "by the Commission's waiver of the notice requirement upon good cause, thus allowing rate changes, found by the Commission to be just and reasonable, to

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[3]The issue in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), was whether a utility may unilaterally change a rate set by contract simply by filing a new rate with the Commission. In *Shell Oil Co.* v. *FPC*, 334 F.2d 1002 (3d Cir. 1964), and *Continental Oil Co.* v. *FPC*, 236 F.2d 839 (5th Cir. 1956), the courts upheld the Commission's refusal to permit retroactive changes in rates.

become effective on the date agreed by the parties." 610 F.2d at 955.[4] Thus, the decision below is consistent with the decision of the only other court to address the issue.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]Petitioner's effort (Pet. 21) to distinguish *City of Piqua* from the instant case is without merit. Petitioners do not appear to challenge the court of appeals' conclusion (Pet. App. 21a-22a) that, because the Commission deferred to the state court's interpretation of the contract, the Commission could not take issue with the court's determination that Arkla's payments to the United States triggered the favored nations clause. Thus, one need not look beyond the terms of the contract to determine the rate to which the parties agreed and the effective date of that rate; whether the rate is just and reasonable, of course, is a matter yet to be determined by the Commission on remand.

[5]With regard to the problem arising from the lack of a quorum in the Fifth Circuit for en banc consideration of Commission cases (Pet. 26-28), in our view the proper solution is to confront the issue of disqualification directly through legislation or amendments to existing rules, rather than employing this Court's certiorari jurisdiction as a substitute for the en banc review procedure.

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